HJH. RAJIAH HJ. MAN

v.

TAI CHENG FINANCE BHD.

HIGH COURT MALAYA, PENANG
EDGAR JOSEPH JR J
[ORIGINATING SUMMONS NO. 795/85]
10 APRIL 1987

LAND LAW: *Caveat - Application for removal - Transfer of land subject to approval - Failure to retransfer land although approval not obtained - Land charged to finance company as security for the repayment of a loan - Allegation of fraud - Whether caveat should be removed.*

This was an application by the applicant, Tai Cheng Finance Berhad, for removal of a caveat registered against certain land ("the land"). The respondent (Hajah Rajiah) and one Nordin bin Ariffin had transferred the land to a developer to develop the land into a low-cost housing estate. It was agreed that the developer could charge the land if he so wished but the developer was to hold a certain portion of the land as trustee for the owners. It was also agreed that the developer undertook to retransfer the land to the owners free from all encumbrances in the event that the approval from the relevant authorities was not obtained. The developer executed a charge in favour of the applicant as security for repayment of a loan. Differences arose between the respondent and Nordin bin Ariffin on the one hand and the developer on the other.

The respondent alleged in her affidavit filed in support of her application for extension of the caveat that although the layout plans submitted by the developer had been rejected by the local authority, he had failed or neglected to retransfer the land to the owners in breach of their agreement. The respondent further alleged that the applicant knew of her rights over the land and was even shown the agreement when the developer was making the application for the loan.

Held:

[1] It was manifestly clear that the respondent's averment that the applicant knew of her interest under the agreement at the time of the loan is nothing less than a wild guess.

[2] If the applicant had been shown the agreement prior to the execution of the charge and therefore knew of her interest in the land, its attention must have been directed to a clause in the agreement which specifically authorises the developer to charge the same. Moreover, neither the respondent nor Nordin bin Ariffin took the elementary precaution of lodging a caveat against the land before the execution of the charge. The respondent was therefore in no position to impugn the title of the chargee.

[3] It was clear beyond peradventure that the statement of claim in affirming the validity of the charge by clear implication, disclosed no cause of action against the applicant and was struck out in so far as it related to the applicant. Any attempt by the owners to relitigate the issue of whether they have a cause of action would be *res judicata*. Accordingly whoever took the land would do so subject to the charge.

[4] Even assuming that the developer had acted fraudulently in executing the charge, there was not a scrap of evidence that the applicant was a party to such fraud.

[5] In all the circumstances, there was no serious question to be tried.

[Removal of caveat ordered. Respondent to pay costs of the proceedings.]

Cases referred to:
Eng Mee Yong & Ors. v. V. Letchumanan [1979] 2 MLJ 214
American Cyanamid v. Ethicon [1975] AC 396
Hari Singh v. Sundarammal [1965] 2 MLJ 174
Waimiha Sawmilling Co. Ltd. v. Waione Co. Ltd. [1926] AC 101
Tai Lee Finance Co. Sdn. v. Official Assignee [1983] CLJ (Rep) 387
Tueh Guat Choo v. Cheah Ah Hot [1932] MLJ 109
Toh Kian Hin v. Ting Ding Woi & Anor. [1987] 1 MLJ 40

Legislation referred to:
National Land Code 1965, ss. 327(1), 340(1), 327

For the applicant - Gerard Chan; M/s. Lim Kean Siew & Co.
For the respondent - Teoh Lin Da; M/s. Johari, Goh & Associates

JUDGMENT

Edgar Joseph Jr J:

In this case, the applicant Tai Cheng Finance Berhad ("the finance company"), had applied under s. 327(1) of the National Land Code 1965 ("the Code") for removal of a caveat registered against certain land comprised in holding 1244, Mukim 6, Province Wellesley North ("the land").

Two preliminary observations need to be made.

Firstly, the finance company being the registered chargee of the land is in the position of a registered proprietor (see s. 340(1) of the Code) and so has a registered title to rely on as *prima facie* evidence of its interest in the land. "... a distinction must be drawn" said Lord Diplock in *Eng Mee Yong & Ors. v. V. Letchumanan* [1979] 2 MLJ 214 @ 215 col. IC and D "between cases where the applicant is the registered proprietor of the land (i.e. the caveatee) and cases where the applicant is some other person who claims a right to an interest in it. In the former case, the caveatee can rely upon his registered title as *prima facie* evidence of his unfettered right to deal with the land as he pleases; it is for the caveator to satisfy the Court that there are sufficient grounds in fact and law for continuing in force a caveat which prevents him from doing so. ... It is otherwise when the applicant under s. 327 is someone other than the caveatee. He has no registered title to rely upon as *prima facie* evidence of his interest in the land. It is for him to begin by satisfying the Court that there are sufficient grounds in fact and law for treating him as a person claiming such an interest in the land as would, if it were established, make him aggrieved by the existence of the caveat ..."

Secondly, the jurisdiction of the Court in considering applications for removal of a caveat is conferred by s. 327(1) of the Code and empowers it "to make such order as it may think just". Clearly, therefore, the Court is vested with a discretion to be exercised in accordance with the principles enunciated in the celebrated case of *American Cyanamid v. Ethicon* [1975] AC 396 since a caveat is in a nature of a statutory injunction.

It was with these general principles in mind that I considered the application before me.

The particular circumstances of this case may be garnered from the affidavits filed in support of and in opposition to the Application and may be shortly stated thus:

On 28 April 1979, the respondent and one Nordin bin Ariffin, as registered proprietors of the land, transferred the same to one Chiew Chee Kin ("the developer") ostensibly for a consideration of RM51,000 only but in reality for the consideration appearing in a joint venture agreement dated 5 June 1979 (Exh. A annexed to Encl. 2) entered into by them.

Essentially, it had been agreed between the parties, that the land was transferred to the developer to enable him, at his own cost and expense, to develop it into a low cost housing estate for the consideration therein stipulated. It was expressly agreed that the developer could charge the land if he so wished (Clause 6). However, the developer was to hold, as trustee for the owners, a certain portion of the land shaded red (Clause 8). It was further agreed that the joint venture agreement was subject to the approval of all plans by the relevant authorities and, in the event of such approval not being forthcoming, the developer undertook to retransfer the land to the owners free from all encumbrances who would then refund a sum of RM70,000 (said to have been previously paid as "a returnable deposit") to the developer (Clause 13).

It would appear that during the interval between the execution of the transfer aforesaid and the joint venture agreement, in particular, on 2 June 1979, the developer, as registered proprietor, executed the charge over the land in favour of the finance company as security for the repayment of a loan of RM250,000 granted by it to him upon the terms and conditions appearing therein.

Be that as it may, in the events which transpired, differences arose between the respondent and Nordin Bin Haji Ariffin on the one hand and the developer on the other.

The respondent alleged in her affidavit affirmed to on 7 November 1985 (Encl. 2) filed in support of her application for extension of the caveat (Encl. 1) that although the layout plans submitted by the developer had been rejected by the local authority on 30 June 1983, he had failed or neglected to re-transfer the land to the owners in breach of Clause 13 of the joint venture agreement.

The respondent further alleged in her affidavit in Reply (Encl.8) that the Applicant knew of her rights over the land by virtue of the joint venture Agreement dated 5 June 1979 [contrary to what one Saw Eng Huat, a director of the finance company had affirmed in his affidavit (Encl. 6)]. It was pointed out by the respondent that the transfer from the owners to the developer (Ex. HRM 2 to Encl. 8) executed on 2 June 1979) and the charge were registered at the Land Office on the same day, that is to say, on 20 July 1979. The respondent went so far as to allege, that she verily believed, that the developer had shown the joint venture agreement to the finance company when making the application for the loan. She did not, however, condescend to disclose the sources of her belief, with the result that this part of her affidavit was plainly inadmissible: see *Hari Singh v. Sundarammal* [1965] 2 MLJ 174. Nor did she care to explain how the developer could have accomplished this feat since the charge was executed on 2 June 1979 whereas the joint venture agreement bears a date 3 days later.

It is also noteworthy that the transfer in favour of the Developer was executed by the owners before one Encik Ismail bin Shabdin, Assistant Collector of Land Revenue, Pulau Pinang, the charge by the developer in favour of the finance company before the late Mr. I.K Cheah, advocate and solicitor, Pulau Pinang and the joint venture agreement before Mr. G. Rethinasamy, advocate & solicitor, Butterworth.

Now, in considering the rival affidavits aforesaid, I kept in mind the salutary advice of Lord Diplock in the *Cyanamid* case *(ibid)* that "It is no part of the Court's duty at this stage of the litigation" - that is in considering a motion for an interlocutory injunction, I interpolate - "to try to resolve conflicts of evidence on affidavits as to the facts on which the claim of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature consideration."

Similarly, in *Eng Mee Yong's* case *(ibid)* at p. 216 col. IB Lord Diplock, in considering an appeal from the decision of the Federal Court restoring a caveat whose removal had been ordered by the High Court, gave general guidance as to the approach which ought to be adopted in such matters in the following terms:

> Their Lordships must therefore turn to the evidence that was before the High Court on the hearing of the application, bearing in mind that if there appears to be any conflict of evidence which is not on the face of it implausible, such a conflict ought not to be disposed of on affidavit evidence only. It leaves a serious question to be tried.

Then, again, I did not lose sight of what Lord Diplock said in *Eng Mee Yong's* case *(ibid)* at p. 215 col 1 I, namely, that "The guiding principle in granting an interlocutory injunction is the balance of convenience; there is no requirement that before an interlocutory injunction is granted the plaintiff should satisfy the Court that there is a 'probability', a '*prima facie* case' or a 'strong *prima facie* case' that if the action goes to trial he will succeed; but before any question of balance of convenience can arise the party seeking the injunction must satisfy the Court that his claim is neither frivolous nor vexatious; in other words that the evidence before the Court discloses that there is a serious question to be tried."

Turning to the facts; it was manifestly clear that the respondent's averment that the bank knew of her interest under the joint venture agreement at the time of the developer's application for the loan is nothing less than a wild guess. In point of fact, during the argument before me, Miss Linda Teoh who appeared for the respondent, was constrained to admit, in answer to a question I had put to her, that she had no evidence documentary or oral to show that the finance company had knowledge of the joint venture agreement at the material time. The only fact she latched on to was that the transfer and the charge concerned were registered at the same time and from this she invited me to infer that the finance company knew of the respondent's interest in the land prior to granting the loan. I did not however consider that such an inference would be justified having regard to the circumstances.

Alternatively, if, as alleged by the respondent, the finance company had been shown the joint venture agreement prior to execution of the charge and therefore knew of her interest in the land, its attention must have been directed to Clause 6 thereof which specifically authorises the developer to charge the same. Moreover, neither the respondent nor Nordin bin Ariffin took the elementary precaution of lodging a caveat against the land before the execution of the charge. She was therefore in no position to impugn the title of the chargee. It was not surprising therefore that the writ of summons which the respondent and Nordin bin Ariffin had caused to be issued on 11 October 1985 against the developer and the finance company, being Civil Suit No. 1571/85, did not attempt anything of the sort. Indeed, the statement of claim which accompanied the writ prayed only for reliefs against the developer and none against the finance company. Most particularly, the very first prayer therein asked that the developer do pay all sums owing to the finance company and so procure the discharge of the charge. It was thus clear beyond peradventure that the statement of claim in affirming the validity of the charge by clear implication, disclosed no cause of action against

the finance company and I had for that reason on 21 August 1986 struck it out in so far as it related to the finance company. The respondent and Nordin would appear to have accepted this position for neither appealed against that order and the issue of whether they have a cause of action against the finance company must be treated as laid at rest since it is implicitly embodied in that order. In other words, any attempt by the respondent or Nordin to relitigate the issue of whether they have a cause of action against the finance company would be barred by *res judicata*. Accordingly, whoever took the land would do so subject to the Charge. I therefore saw no point whatever in allowing the caveat to remain.

I would go further an add that apart from any question of *res judicata*, even assuming, for one moment, the developer had acted fraudulently in executing the charge and accepting the respondent's allegations in her affidavit at their full face value so that the finance company had prior knowledge of her interest under the joint venture agreement fraud within the meaning of *Waimiha Sawmilling Co. Ltd. v. Waione Co. Ltd.* [1926] AC 101 in the sense of "dishonesty" - "a wilful and conscious disregard and violation of the rights of other persons" could not be ascribed to the finance company as there was not a scrap of evidence that it was a party to such fraud: see *Tai Lee Finance Co. Sdn. v. Official Assignee* [1983] CLJ (Rep) 387, *Tueh Guat Choo v. Cheah Ah Hot* [1932] MLJ 109 and the recent case of *Toh Kian Hin v. Ting Ding Woi & Anor.* [1987] 1 MLJ 40.

In all the circumstances, I was thoroughly convinced that as between the respondent and the finance company there was no serious question to be tried. The respondent's remedy, if at all, must lie against the developer. Moreover, after having regard to the interests of all parties, keeping in mind their foreseeable positions, consideration of hardship, the balance of convenience and any other relevant discretionary factors, I had no hesitation in ordering the removal of the caveat. The respondent was also to pay the costs of the proceedings.

Also found at [1987] 2 CLJ 154